IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 500

William S. Halpern and Louis N. Seltzer, *d/b as* BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-Burlington Broadcasting Co., Inc.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR JOHN C. GIORDANO IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals, which are unreported, are set forth in the petition at pages 11, 12, and 13.

JURISDICTION

The basis for the jurisdiction of this Court is adequately stated in the petition (Pet. 2).

QUESTION PRESENTED

Whether the court of appeals, having formerly remanded a decision of the Federal Communications Commission on comparative broadcast applications for further hearing on the grantee's application, and retained jurisdiction, may — after refusal of the grantee to proceed — again remand the case to the Commission with directions to reopen the record, accept new competing applications, hold a new comparative hearing, and afford corollary relief.

STATUTE INVOLVED

Sections 402(g) and 402(h) of the Communications Act of 1934, 48 Stat. 1093, as amended, 47 U.S.C. 402(g) and 402(h), and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009 (e), are set forth in the petition at pages 15-16.

STATEMENT

On November 18, 1958, petitioner, William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, filed an application for a new standard broadcast station at Burlington, New Jersey. Mutually exclusive applications were subsequently filed by Burlington County Broadcasting Company, and John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company.

After a comparative hearing on the three applications, the Commission's Hearing Examiner issued an Initial Decision on May 2, 1962, granting the application of Burlington County Broadcasting Company. On appeal to the full Commission, the Commission granted the application of John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company on June 14, 1963, and denied the applications of

petitioner and of Burlington County Broadcasting Company;[1] the latter then dropped out of the proceeding.[2]

Farina assigned his construction permit, with Commission approval, to a corporation owned by him (except for single qualifying shares held by members of his family), and new broadcast station WJJZ began operating at Mount Holly, New Jersey, on December 13, 1963, under "program test authority" issued to the assignee.[3]

Respondent adopts petitioner's Statement (Pet. 3-6) with the exception of the first two paragraphs on page 3, and with the addition to the description of West Jersey Broadcasting Company's application at the first full paragraph on page 4 of the petition of the following: West Jersey proposes to take over the broadcast facilities of station WJJZ, and to reimburse the creditors of the insolvent permittee, Mount Holly-Burlington Broadcasting Co., Inc.[4]

ARGUMENT

The petition for certiorari does not present any special or important reasons for review of the decision of the court of appeals herein.

Petitioner alleges (1) that the order of the court of appeals conflicts with the decisions of this Court; and (2) that the order — if based upon Section 402(h) of the Communications Act of 1934, as amended — is an interpretation of Section 402(h) in conflict with Section 402(g) of the

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[1] *William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, et al.*, 34 F.C.C. 1135 (1963).

[2] "Motion for Remand to Federal Communications Commission" filed December 11, 1964 in the court of appeals, pp. 2-3.

[3] *Id.* at 3.

[4] *Id.* at 5.

Act, which incorporates the provisions of Section 10(e) of the Administrative Procedure Act. The alleged conflicts do not exist.

I.

Prior to 1952, Section 402(e) of the Communications Act limited the court of appeals in its review of decisions of the Federal Communications Commission in comparative broadcast cases to remanding such cases to the Commission in the event of reversal.[5] In the *Pottsville* case, on the other hand, this Court held in 1940 that the Commission could reopen the record in a remanded case, add new parties and applicants, add new issues, and compile a new record.[6] Thus, the Commission was able to vitiate the effect of a reversal by the court of appeals in a comparative broadcast case in the sense that a successful appellant-applicant was subject to the hazard, after reversal, of losing once again before the Commission in competition with new applicants.

In 1952, Section 402(h) was added to the Communications Act, depriving the Commission of its authority un-

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[5] "(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however*, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal." 48 Stat. 1093.

[6] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

der the *Pottsville* case by confining the Commission on remand of a case from the court of appeals to the record made prior to appeal.[7] At the same time, however, the 1952 amendments removed the limitation on the power of the court of appeals by providing in Section 402(h) that the court itself could order the Commission to reopen the record, add new issues, and add new parties in a remanded case.[8]

II.

Petitioner alleges a conflict between the order of the court of appeals herein and the decisions of this Court with respect to the authority of the Commission *(vis-a-vis* the court of appeals) in *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), and *WJR, The Goodwill Stations v. Federal Communications Commission*, 337 U.S. 265 (1949). Discus-

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[7] "(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined." 48 Stat. 1093, as amended, 47 U.S.C. 402(h).

[8] "Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. The committee points out that under the language of this subsection the appellate court would have ample authority, either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as a part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission. This authority stems from the phrase 'and unless otherwise ordered by the court'." Sen. Rep. No. 44, 82d Cong., 1st Sess., p. 12.

sion of these cases is unnecessary here; both were decided prior to 1952 and are completely inapposite for the purpose cited in the petition. The remaining case cited by petitioner in support of its allegation is *Federal Communications Commission v. Taft B. Schreiber*, ___ U.S. ___, 14 L.Ed. 383, 85 S.Ct. ___ (1965). This case also is completely inapposite; it involved the power of the Commission to compel an officer of a corporate producer-packager of television programs to produce certain data in an investigatory hearing. The case did not involve an adjudication between mutually exclusive applicants for broadcast facilities, and no appeal under Section 402 of the Communications Act was involved.

III.

There is no conflict, as alleged, between Sections 402 (g) and 402(h) of the Communications Act, which were adopted together in 1952 by Congress. It is clear that the review by the court of appeals of decisions of the Commission in Section 402 cases is governed by the provisions of Section 10(e) of the Administrative Procedure Act (incorporated by reference in Section 402(g) of the Communications Act) and by Section 402(h) of the Communications Act. There is nothing conflicting in the language of the two sections, and the petition does not demonstrate any conflict.

IV.

There is also language at page 7 of the petition which implies that the court of appeals may have resorted to some strange and esoteric interpretation of Section 402 (h). This is a completely gratuitous inference. The action of the court of appeals is completely compatible with the straight-forward meaning of Section 402(h): when the Court believes in the exercise of its judicial discretion that the facts of a particular case justify the addition of new parties and new issues, and the compiling of a new record, it may order the Commission to act appropri-

ately. While a successful appellant-applicant in a comparative hearing may be required to go through an additional hearing process before the Commission, the procedure does not invade the rights of such party any more than such procedure invaded his rights when a further hearing was held under the doctrine of the *Pottsville* case.

V.

Whenever the court of appeals orders the Commission to reopen the record and admit new parties and new issues, the order must be the product of the exercise of judicial discretion by the court of appeals on the unique facts of the particular case before it. It is submitted that this is not an area of review contemplated by Rule 19 of this Court. It is noted here, by way of example, that there has been no case before the Commission and the court of appeals reasonably similar or analogous to the instant case, and there is no reason to anticipate that there will be a similar set of facts involved in any subsequent cases.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 24, 1965